Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 139.

THE DETROIT, FORT WAYNE AND BELLE ISLE RAILWAY, PLAINTIFF IN ERROR,

vs.

CHASE S. OSBORN, COMMISSIONER OF RAILROADS.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

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Since preparing our brief on the merits we have found numerous authorities that support the position taken by us.

But State of Louisiana *vs.* Canal & Claiborne Railroad Company, 50 La. Ann., 1189; L. R. A. Book 56, p. 287, is so similar in its legal principles that we feel warranted in referring to it at some length. It holds that an ordinance of the city council of the city of New Orleans which requires corporations operating street electric cars within the limits of the city, upon tracks laid down in the public streets thereof, to water their tracks so as to effectually lay the dust within

their tracks is a legal exercise of the police power of the city. Such an ordinance tends to promote the comfort and convenience of passengers and the health and comfort of the city. Counsel for the railroad company made the exact legal objections that are made by counsel of the railroad company in this case. They claimed that the ordinance was unreasonable, in that it laid the burden of the performance of a public duty upon a person or corporation making use of the street that was not laid upon all persons in like condition making use of the public highway; that it was unreasonable because unequal and not uniform; that it proposes and undertakes to add new conditions and to require the performance of new duties by a street railroad which has purchased the right by contract to operate its lines through the streets. Therefore it impairs the obligation of the contract and is violative of the Constitution of the United States and the constitution of the State of Louisiana. Also it deprives the citizen of his property and denies to the defendant corporation the equal protection of the law; that the performance of the duty required by the ordinance was burdensome and would cost a large sum of money annually.

The court sustains the position we take in this case that the State, in the exercise of its police power, may impose a burden upon a street railway corporation that it cannot upon a private citizen, for the reason that the latter can use the highway without a license from the public authorities, while the corporation that wishes to use the street to make money for itself must obtain such license. On this point the court says:

"The examples counsel gives of the right which the proprietor of a dray, the water cart, the omnibus, fur-

niture van, sugar wagon, cotton float, and pleasure vehicle has to the free use of the street for the purposes of his business are inappropriate, because neither exercises a franchise on the public streets of the city, but their use of the streets is just the same as that of any other private citizen. While each of said proprietors is licensed by the city to pursue his respective calling, his use of the streets is merely incidental thereto. But the street car company purchases from the city a public franchise or right to lay its tracks of steel fixedly and permanently in the center of the public highways of the city and to maintain same therein for a period of years, and to operate their cars thereon for the purpose of carrying passengers for hire. And it is disclosed by the evidence that the dust which occasions the inconvenience and discomfort of the passengers and the detriment to public health is directly and immediately referable to its use of that franchise; and it is that injurious use and enjoyment of its franchise which the aforesaid ordinance is intended to regulate."

In answer to the point raised by counsel that the large expense of watering their tracks would render this ordinance so burdensome as to seriously impair its franchise and render its revenues unremunerative, the court gives this answer:

"This exigency of defendant's franchise must be reasonably supposed to have been within the contemplation of the contracting parties when the franchise was secured and consequently an incident thereto."

The court then holds that this ordinance was valid as a simple exercise of the police power of the State. It says:

"The principles of law appertaining to the exercise of the police power of a State or municipal government have been so frequently enunciated by the courts of this State, and as

well as by those of other States and of the Supreme Court of the United States that the chief difficulty presented to the judicial mind consists in the selection to be made therefrom of those most suitable to the question under discussion."

The court holds on this point, as does every other court in this country, that the subjection of existing corporations to new police regulations does not involve a repeal or amendment of the charters, "for an act of incorporation simply guarantees the right to act and do business as a corporate body, subject, of course, to the laws of the land and the legitimate control of government and to such rules and regulations as may from time to time be ordained and established for the preservation of the safety, the health, and the morality of the people."

Without quoting, we refer the court to the following cases, which sustain our position that the legislation of Michigan and the order of the railroad commissioner based thereon, assailed by plaintiff in this case, is simply an exercise of the police power of the State and so clearly valid as to admit of no question whatever.

Pearsall *vs.* Great Northern Railway Co., 161 U. S., pp. 646–665.

Gladson *vs.* Minnesota, 166 U. S., pp. 427, 430.

Chicago and N. W. R'y Co. *vs.* City of Chicago, 29 N. E. Rep., pp. 1109–1111.

Chicago, Milwaukee & St. Paul R. R. Co. *vs.* City of Milwaukee, 97 Wis., p. 418.

Very respectfully,

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